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Implications of the World Bank Sanctions Regime for International Business

BY TIMOTHY DICKINSON, CORINNE LAMMERS & MORGAN HEAVENER

Background

The World Bank's Integrity Vice Presidency ("INT") recently released its Fiscal Year 2014 Annual Report ("INT 2014 Annual Report"), which described the anticorruption efforts of the World Bank and INT over the past year and noted as well the World Bank's anticorruption efforts in the fifteen years since the Bank established the precursor to INT, the Anti-corruption and Fraud Investigation Unit, and brought its first sanctions actions. INT released its report four months after the June 2014 release of the first ever report by the World Bank's Office of Suspension and Debarment ("OSD Report"). The two reports are part of the Bank's ongoing efforts over the past several years to improve the transparency and efficiency of its sanctions regime. That regime has taken on increasing prominence and significance to companies and individuals in recent years as the Bank has brought a number of actions against multinational companies, including actions that resulted in debarments from all contracts with financing by the World Bank or any other multilateral development bank ("MDB"), significant financial penalties, and requirements to enhance the companies' compliance programs. This article discusses the structure of the World Bank's sanctions regime, the impact and increasing prominence of that regime, some of the more interesting findings and "lessons learned" from the Bank's recent efforts to make the system more transparent, and, finally, provides some key concerns for companies that could be impacted by the sanctions regime.

World Bank Sanctions Regime

The Bank's sanctions regime is a quasi-judicial administrative process designed to adjudicate instances in which individuals or companies may have engaged in sanctionable misconduct in connection with World Bank-financed contracts. Under the Bank's guidelines, such misconduct includes fraud, corruption, collusion, obstruction, and coercion.[1] The World Bank does not have any power to impose criminal or civil sanctions. Instead, the Bank's primary method of sanctioning entities is debarment, making the individual or company ineligible to receive contracts financed by the World Bank for a stated period of time. As noted, individuals or companies debarred by the World Bank may also be subject to cross-debarment by other MDBs.[2] The World Bank may also sanction entities through a Negotiated Resolution Agreement ("NRA"), which is negotiated between INT and the sanctioned entity.[3]

Under the World Bank sanctions system, the Bank's INT identifies and investigates matters of alleged misconduct. In instances in which INT believes that misconduct has occurred, it initiates sanctions proceedings by referring the matter to OSD with the evidence that INT has identified.[4] OSD's role is to

serve as a check and balance in the sanctions process, including conducting an independent preliminary assessment of the evidence presented by INT and determining whether sanctions are appropriate.[5] In making such a determination, OSD decides whether INT has presented "sufficient evidence" to support the allegations. "Sufficient evidence" is defined as "evidence sufficient to support a reasonable belief . . . that it is more likely than not that the Respondent has engaged in [the alleged sanctionable practice(s)]." OSD also makes initial determinations with regard to whether the World Bank should temporarily suspend entities pending the final outcome of the sanctions proceedings.[6]

In instances in which OSD takes action to sanction an entity, such decisions by OSD may be appealed by the sanctioned entities to the Bank's Sanctions Board, which is a body comprised of three Bank staff members and four non-members.[7] That Board makes final determinations of whether the Bank should impose sanctions. As noted, the World Bank may also sanction entities through an NRA, which INT negotiates with the sanctioned entity.[8] INT may enter into such an agreement with an individual or company at any stage of the sanctions process.

World Bank Enforcement Efforts

The World Bank sanctions regime has taken on greater visibility in recent years in large part because of the increased number of companies and individuals that the Bank has sanctioned and the severity of the consequences associated with such sanctions. For instance, after sanctioning an average of 16 companies or individuals per year for the five-year period between FY 2005 and FY 2009, the Bank sanctioned an average of 56 companies or individuals for the five-year period between FY 2010 and FY 2014. For FY 2014, the Bank sanctioned 71 companies and individuals, the second highest number of entities ever sanctioned by the Bank and approximately 25 percent more than the five-year average between FY 2010 and FY 2014.[9] With regard to the severity of World Bank sanctions, companies that are debarred by the World Bank for a period of one year or greater are automatically cross-debarred by other MDBs, including the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank. Given that the MDBs finance thousands of projects worth billions of dollars each year, exclusion from all contracts with MDB financing could be a significant impediment to the business of many companies.

As noted above, the World Bank also has introduced a process for NRAs. Since introducing this process in 2011, it has executed several such resolutions with large multinational corporations. In addition to debarments, these resolutions with multinational corporations have included significant financial penalties and requirements to enhance compliance programs.[10] The Bank also has created a position of "Integrity Compliance Officer" whose responsibilities include ensuring that companies are meeting such compliance-related requirements.

Recent World Bank Guidance

The INT 2014 Annual Report and OSD Report both provide useful insights for companies or individuals whose business could potentially touch World Bank-financed contracts, including discussing the manner in which the World Bank approaches sanctions actions and "lessons learned" for both INT and OSD. For instance, the INT 2014 Annual Report discusses how INT seeks to ensure that its sanctions actions promote a greater culture of compliance among those bidding on Bank-financed contracts, noting that the Bank's default sanction is now debarment with conditional release because it requires debarred companies to meet conditions such as implementing or enhancing corporate compliance programs in order to regain eligibility for Bank-financed contracts.[11] The Bank's Integrity Compliance Officer validates that companies are meeting such conditions. The INT Report further indicates that a number of its investigations have involved "misconduct by small, local offices of widely known

multinational corporations," stating that "the need for integrity to permeate an entire corporation's operations is clear, although the progress in doing so has been uneven." According to the INT Report, 31 companies are currently actively engaged with the Integrity Compliance Officer in an effort to meet the conditions of their release, and of those 31, 13 are multinational corporations, 16 are small and medium-size enterprises, and two are individuals.[12]

Both the INT Report and OSD Report also highlight the relative importance of "fraud" rather than "corruption" in World Bank sanctions actions. The OSD Report notes, for example, that fraud can be equally deleterious to development effectiveness as corruption but is easier to prove. Among the OSD's lessons learned therefore is the suggestion that the Bank conserve its resources by focusing on allegations of fraud rather than corruption. The number of fraud cases brought by the Bank helps illustrate this focus. Of the 224 individuals or companies that the World Bank has debarred or otherwise sanctioned from 2007 to June 2013, 179 of the cases involved fraud (86 percent of the total), with 30 involving corruption (14 percent), 18 involving collusion (9 percent), 4 involving obstruction (2 percent), and 1 involving coercion (less than 1 percent).[13]

Of particular interest to companies against whom INT initiates sanctions actions is the fact that OSD exercises significant discretion with regard to sanctioning those entities referred to it by INT. In 38 percent of the cases referred by INT to OSD, OSD determined that there was insufficient evidence to support one or more of INT's claims, resulting in OSD referring the case back to INT for revision.[14] Furthermore, in a slight majority of such cases, OSD found that INT had presented insufficient evidence for all claims against one or more of the individuals or entities proposed to be sanctioned in the case.[15] Finally, the OSD Report notes that approximately 60 percent of World Bank sanctions have been issued by OSD since OSD's creation, with the remaining cases resolved after appeal to the World Bank Sanctions Board.

The World Bank Sanctions Board has also taken steps to increase transparency, including publishing its decisions as well as a law digest that includes the "aspects of its decisions that it deems illustrative of the legal principles it has applied in reaching its decisions."[16] Moreover, the Bank has publicly undertaken an effort to revise its Sanctions Procedures, including formally soliciting feedback (published on the Bank's website) from external stakeholders regarding potential improvements to the Bank's sanctions regime.[17]

The Impact of the Bank's Sanctions Regime

The World Bank's recent enforcement efforts and the guidance that the Bank has provided have significance for companies for a number of reasons.

- First, the Bank's enforcement efforts have resulted in hundreds of sanctions over the past several years, including actions against large multinational corporations such as Siemens, Alstom, KBR, and SNC-Lavalin. Assuming current enforcement trends continue, this number could continue to increase significantly.

- Second, companies should be sensitive to the Bank's focus on finding "fraud" in Bank-financed contracts rather than corruption. Misconduct as seemingly minor as misrepresenting the qualifications of contract staff or falsifying timesheets could potentially lead to World Bank sanctions.

- The significance of the Bank's sanctions system is heightened by the fact that companies debarred by the World Bank for one year or longer are automatically cross-debarred by other

MDBs. Similarly, the World Bank will cross-debar companies sanctioned by other MDBs under those MDBs' own sanctions regimes (most of which are less sophisticated than the World Bank's regime).

- The Bank's standard of proof ("evidence sufficient to support a reasonable belief . . . that it is more likely than not that the Respondent has engaged in [the alleged sanctionable practice(s)]" is significantly lower than that found in most criminal justice systems but the potential consequence—debarment from any MDB-financed contracts—can be quite significant.

- Once a company has been debarred from MDB-financed contracts, that status may be raised in other non-MDB procurements, whether public or private. A debarred company may well find itself in the position of having to explain to national authorities the reason for the debarment when competing for other contracts or face collateral debarment from those authorities as well.

- Additionally, in our experience, multinationals may bid on large contracts without ever being aware that the contract has funding by the World Bank or other MDBs, which may be only a small source of the overall financing of the project. Companies can therefore face sanctions by the World Bank (or other MDBs) for fraud-related misconduct in connection with contracts that they did not even realize were Bank-financed. Accordingly, companies that bid on any type of contract that might have MDB financing should take steps both to ensure that they are aware of such financing and to remediate the risks of MDB enforcement actions.

- Finally, the World Bank (and other MDBs) maintains a 10-year statute of limitations for sanctionable practices, making it possible for the World Bank to bring sanctions against companies in connection with contracts that are long completed. For instance, in 2012 the World Bank and Alstom entered into a Negotiated Resolution Agreement for an improper payment in 2002 of €110,000 to an entity controlled by a former Zambian official. That agreement included a three-year debarment of an Alstom entity, a $9.5 million financial penalty, and a commitment by Alstom to enhance its compliance program.[18]

Conclusion

The World Bank has publicly and forcefully sought to eliminate fraud and corruption from Bank-financed contracts. At least in part because World Bank sanctions are subject only to the Bank's own administrative rules and cannot be appealed to any national court or other authority, the Bank recently has sought to increase transparency regarding the manner in which it carries out such sanctions. The INT and OSD reports are part of that process of increasing transparency, providing significant information regarding the nature of INT's and OSD's work within the Bank's sanctions system. This process is expected to continue with the Bank's ongoing effort to revise its Sanctions Procedures. As the Bank's efforts to increase its effectiveness and level of activity continue, any individual or multinational corporation bidding on contracts that could conceivably have World Bank (or other MDB) financing should pay particular attention to the recent reports, and the Bank's sanctions regime more generally, given that Bank sanctions may have significant consequences, including cross-debarment by other MDBs and other collateral consequences.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

Timothy L. Dickinson
1.202.551.1858
timothydickinson@paulhastings.com

Corinne A. Lammers
1.202.551.1846
corinnelammers@paulhastings.com

Morgan A. Heavener
1.202.551.1744
morganheavener@paulhastings.com

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[1] World Bank Sanctions Procedures, Section 1.02(a) (Apr. 2012).

[2] Agreement for Mutual Enforcement of Debarment Decisions (Apr. 9, 2010), *available at* http://crossdebarment.org.

[3] World Bank Sanctions Procedures, Section 1.02(a) (Apr. 2012).

[4] The World Bank Office of Suspension and Debarment: Report on Functions, Data and Lessons Learned 2007–2013 (2014) ("OSD Report"), p. 11.

[5] OSD Report, p. 10.

[6] World Bank Sanctions Procedures, Section 1.02(a) (Apr. 2012).

[7] World Bank Sanctions Board Statute, Article 5 (Sept. 2010).

[8] World Bank Sanctions Procedures, Section 1.02(a) (Apr. 2012).

[9] The statistics are drawn from INT's annual reports for Fiscal Years 2005 to 2014, which are available at the INT website http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:22203443~menuPK:5372841~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html.

[10] Since the Bank does not have formal power to assess financial penalties or to force companies to make changes to their compliance programs, such penalties may only arise as part of Negotiated Resolution Agreements.

[11] World Bank Integrity Vice Presidency, Annual Update for Fiscal Year 2014 ("INT Report"), p. 18.

[12] INT Report, p. 19.

[13] OSD Report, p. 28. The percentages exceed 100 percent because 21 cases involved multiple types of misconduct.

[14] OSD Report, p. 30.

[15] *Id.*

[16] World Bank Sanctions Decisions, *at* http://go.worldbank.org/58RC7DVWW0; The World Bank Group Sanctions Board, Law Digest (Dec. 2011), *at* http://go.worldbank.org/S9PFFMD6X0.

[17] Consultation on Review of the World Bank Group Sanctions System, *at* http://consultations.worldbank.org/consultation/sanctions-reviews; Review of the World Bank Group Sanctions System Global Multi-Stakeholder Consultations, Phase I: July-October 2013, Feedback Summary, *at* http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/FeedbackSummaryPhaseI.pdf.

[18] *See* Press Release, World Bank, Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates (Feb. 22, 2012), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:23123315~pagePK:64257043~piPK:437376~theSitePK:4607,00.html. The nature of Alstom's commitment to enhance its compliance program is not specified in the Bank's press release, and the terms of the NRA are not public.